86 - 8

Supreme Court, U.S.
FILED
MAY 12 1986
JOSEPH F. SPANIOL, JR.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

GIOVANNI MASI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court abused its discretion under Rule 33, Federal Rules of Criminal Procedure, when it refused to hold a hearing to inquire into the Government's failure to produce specific records in existence at the time of trial which the Government failed to produce to the Petitioner or, otherwise, inquire into Petitioner's claim for a new trial?

2. Whether the District Court failed to comply with Rule 32 (c)(3)(D), Federal Rules of Criminal Procedure, regarding disputed matters in the presentence report?

3. Whether the District Court abused its discretion under Rule 35, Federal Rules of Criminal Procedure,

when it refused to reduce the Petitioner's sentence based upon the "gravity of the offenses" without addressing extenuating and mitigating factors?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the United States District Court where RAYMOND J. DEARIE, United States Attorney for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201, Respondent-Appellee; and GIOVANNI MASI, Petitioner-Appellant herein.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW.... | i |
| PARTIES TO THE PROCEEDING BELOW... | ii |
| TABLE OF CONTENTS..... | iii |
| TABLE OF AUTHORITIES..... | v |
| OPINION BELOW..... | 2 |
| JURISDICTION..... | 2 |
| STATUTORY PROVISIONS INVOLVED..... | 3 |
| STATEMENT OF THE CASE..... | 4 |
| REASONS FOR GRANTING THE WRIT..... | 12 |
| I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO HOLD A HEARING TO INQUIRE INTO THE GOVERNMENT'S FAILURE TO PRODUCE SPECIFIC RECORDS IN EXISTENCE AT THE TIME OF TRIAL WHICH THE GOVERNMENT FAILED TO PRODUCE TO THE PETITIONER OR, OTHERWISE, INQUIRE INTO PETITIONER'S CLAIM FOR A NEW TRIAL..... | 12 |
| II. THE DISTRICT COURT DID NOT COMPLY WITH RULE 32(c)(3)(D), FEDERAL RULES OF CRIMINAL PROCEDURE, REGARDING CHARACTERIZATION OF THE PETITIONER AS "A MAJOR COCAINE SMUGGLER AND DISTRIBUTOR", "A MAJOR SOURCE OF METHAQUALONE IN THE FLORIDA AREA", AND "CAPABLE OF VIOLENT CONDUCT" REPORTED IN THE PRESENTENCE REPORT..... | 18 |

Page

III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO REDUCE THE PETITIONER'S SENTENCE BASED UPON THE "GRAVITY OF THE OFFENSES" WITHOUT ADDRESSING EXTENUATING AND MITIGATING FACTORS... 25

CONCLUSION..... 28
APPENDIX A..... A1
APPENDIX B..... B1

# TABLE OF AUTHORITIES


| CASES | Page |
|---|---|
| UNITED STATES v. BAGLEY<br>104 S. Ct. 3375 (1985) | 15,16 |
| UNITED STATES v. PETITTO<br>767 F. 2d 607 (9th Cir., 1985) | 21 |
| UNITED STATES v. RONE<br>743 F. 2d 1169 (7th Cir., 1984) | 22 |
| UNITED STATES v. STEWART<br>770 F. 2d 825 (9th Cir., 1984) | 22 |
| UNITED STATES v. VELASQUEZ<br>748 F. 2d 972 (5th Cir., 1984) | 22 |

| STATUTES | |
|---|---|
| 5 U.S.C. Sect. 552 | 13 |
| 21 U.S.C. Sect. 841 (a)(1) | 5 |
| 28 U.S.C. Sect. 1254 (1) | 2 |

| MISCELLANEOUS | |
|---|---|
| Federal Rules of Criminal Procedure | |
| Rule 32 (c)(3)(A) | 19 |
| Rule 32 (c)(3)(D) | 3,18 |
| Rule 33 | 3,12 |
| Rule 35 | 26 |

IN THE
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October Term, 1985

GIOVANNI MASI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner, GIOVANNI MASI, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 13, 1986.

## OPINION BELOW

The Memorandum of Decision and Order of the United States District Court for the Eastern District of New York (Appendix A, infra, p. A1), was entered on September 10, 1985. The Order of the United States Court of Appeals for the Second Circuit was filed on March 13, 1986. The opinion is reproduced as Appendix B, infra, p. B1.

## JURISDICTION

The opinion of the Court below (Appendix B, infra, p. B1) was not reported. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. Sect. 1254 (1).

## STATUTORY PROVISIONS INVOLVED

Rule 33, Federal Rules of Criminal Procedure, pertaining to new trial, provides as follows:

> The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based upon the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period."

Rule 32 (c)(3)(D), Federal Rules of Criminal Procedure, pertaining to sentence and judgment provides as

follows:

> (D) If the comments of the defendant and his counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegations, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons or the Parole Commission.

## STATEMENT OF THE CASE

The Petitioner was charged with violations of Federal Narcotics Laws during the period from December 1, 1982, to March 24, 1983. Named in the indictment were Codefendants JOSEPH CINELLI and the Petitioner. Count I

alleged a conspiracy between the Defendants during the period from December 1, 1982, to March 24, 1983 to violate Section 841(a)(1) of Title 21, United States Code, by distributing and possessing with intent to distribute "substantial quantities" of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. No amount was specifically alleged.

Count II alleged that, on or about December 1, 1982, CINELLI and the Petitioner distributed a quantity of cocaine hydrochloride. Testimony at trial set the amount at about one ounce.

Count III alleged that, on or about February 9, 1983, CINELLI and the Petitioner possessed with intent to distribute a quantity of cocaine

hydrochloride. Although no drugs were seized, testimony indicated the amount to be about four ounces.

The Petitioner had been apprehended on March 24, 1983, while sleeping at his residence in Miami, Florida, with several loaded guns, and he was never able to secure his release pending trial on account of inability to meet the financial requirements imposed by the court.

Trial of this case lasted three days and the Government's case was predicated upon the testimony of an undercover agent, out-of-court statements of the Codefendant as reported by the agent, and taped telephone conversations.

The Petitioner was tried and

convicted on all three counts of the indictment. On July 7, 1983, the Court set sentencing for August 18, 1983 and the United States Probation Office was directed to prepare a presentence report.

The Petitioner, a long-time resident of Florida, had retained the services of New York counsel, JOHN JACOBS, and Florida counsel, LUIS E. RIVERA-MONTALVO, for his defense. Florida counsel handled the presentence report preparation and coordination with the United States Probation Office, Miami, Florida. Affidavits and other documentation was submitted. The final report was prepared by United States Probation Office, Long Island, New York.

On August 9, 1983, New York counsel was notified that sentencing would take

place on August 18, 1983, and that the presentence report was available for his review at the office in Uniondale, New York. By letter dated August 16, 1983, New York counsel requested an evidentiary hearing regarding three specific items in the presentence report, to wit: (a) characterization of the Petitioner as "a major cocaine smuggler and distributor"; (b) characterization of the Petitioner as "a major source of supply of methaqualone in the Florida area"; and (c) characterization of the Petitioner as "capable of violent conduct".

Counsel asked that the hearing be set for September 7, 1983, to be followed with sentencing. The postponement was needed to prepare a challenge to factual inaccuracies in the report. The District Court granted the request

and a docket entry was made. For reasons outside the record of trial, the hearing was rescheduled for August 19, 1983, when the Petitioner was abruptly brought before the Court to confront the presentence report for the first time as well as the witnesses against him. Ultimately, the Court agreed to continue the sentencing hearing on August 24, 1983, in order to allow the Petitioner time to challenge the report and consult with Florida counsel, who was not present at the hearing. However, when the Court advised the Petitioner that "...he will get a full hearing because I have in mind a very substantial sentence for him and he better know it now so he can do whatever preparing you want". The Petitioner responded "Wait a minute", in clear

disagreement and attempted to relieve the New York counsel of his representation to insure a fair hearing, a request which was denied by the Court.

On August 24, 1983, the Petitioner appeared before the District Court with Florida counsel intending to challenge the presentence report but was advised that the continued hearing was for sentencing only. The Petitioner was then sentenced to 10 years confinement on each count of the indictment to run concurrently, in addition to a special parole term of ten years. The District Court did not make "findings" as to the matters disputed on August 19, 1983 and noted in the August 16, 1983 correspondence, and did not allow the Petitioner to further challenge inaccuracies in the presentence report. The District Court

directed that the transcript of the minutes of the sentencing process be attached to the presentence report for the Parole Commission to make its conclusions as to disputed matters.

On April 5, 1985, Florida counsel moved the District Court for a hearing date to consider a Motion to correct illegal sentence and Motion for reduction of sentence. Statements, affidavits, and achievements prior to and during confinement were documented and attached to the motions. Thereafter, on July 2, 1985, Florida counsel moved the District Court for a hearing to consider a Motion for New Trial. Without hearing on the matters, the District Court entered a Memorandum of Decision and

Order denying all motions. It is from this order that the Petitioner sought relief from the United States Court of Appeals for the Second Circuit and from which we know seek a Writ of Certiorari.

## REASONS FOR GRANTING THE WRIT

### I.

Florida counsel moved the Court for a New Trial under Rule 33, Federal Rules of Criminal Procedure. The request was predicated upon two distinct reasons of which only one we seek review. The Petitioner had requested the District Court to inquire by means of a hearing into the allegation that there was information which had been withheld from the defense at trial.

Prior to trial, New York counsel

made a written request for discovery and production of information regarding the Petitioner's case. A docket entry was made on May 10, 1983. At trial, some information was provided to the Petitioner; however, subsequent to sentencing the Petitioner became aware that other records were in existence at the time of trial but which were not made available or to which the Government claimed privilege. The existence of these records was first made known to the Petitioner by response to a request under the Freedom of Information Act, Title 5, United States Code Section 552, et seq. However, complete copies of the records were not provided and most of the information was masked.

A request for the specific records

was made on July 10, 1984, by correspondence to the assistant U.S. Attorney who represented the Government at trial. The District Court was advised of this situation by copy of correspondence dated July 26, 1984. Copy of these letters were attached to the Petitioner's motions.

During oral arguments before the Court of Appeals the Government acknowledged the existence of the disputed documents and their failure to provide them to the Petitioner. At the Court's request, copies of the disputed documents were submitted to them and considered for the first time when deciding the appeal.

The Court of Appeals has taken the view that there is no significant chance

that the introduction of the material at a new trial would lead to a different result for the Respondent. Essentially, the Court takes the view that they are in a better position to evaluate the provative value of this information. Furthermore, the Court has impliedly weighed all possible uses the Petitioner might have for this information and ruled this information of no value to the Petitioner. We disagree.

The "strict standards" enunciated in United States v. Bagley, 104 S. Ct. 3375, 3384 (1985) can not apply to cases like this where the Government withholds information from the Petitioner and then during oral arguments makes first disclosure of the information depriving the trial court (trier of

facts) of the opportunity to properly evaluate the information.

The Petitioner made a showing of prejudice by identifying the specific documents claimed to have been withheld. As in Bagley, supra., an evidentiary hearing should have been held by the District Court. We can not say that an Appellate Court is best suited to evaluate the possible uses of evidence when they never had the opportunity to observe the conduct and demeanor of the witnesses at trial.

The District Court and Court of Appeals have acted very precipitately when they disregard the Petitioner's request for a "hearing" to "inquire" into this matter. Furthermore, such an inquiry belongs with the District Court

who observed the proceedings and evidence presented in open court. The Court has impliedly condoned the Government's withholding of information which reasonable pertains to the testimony presented at the presentence hearing and serves well to impeach testimony given regarding the Petitioner's drug involvement. These documents disclose that a witness who testified at the hearing had given a previous inconsistent statement regarding Petitioner's drug involvement.

II

The sentence and judgment entered against the Petitioner are illegal in that the District Court failed to adhere to the mandatory provisions of Rule 32 (c)(3)(D), Federal Rules of Criminal Procedure which had become effective August 1, 1983, just 23 days before. In pertinent part, the rule provides that

> ...the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy

> of the presentence investigation report thereafter made available to the Bureau of Prisons or the Parole Commission. (emphasis added)

Furthermore, Rule 32 (c)(3), Federal Rules of Criminal Procedure, requires that

> (A) At a reasonable time before imposing sentence the court shall permit the defendant and his counsel to read the report of the presentence investigation exclusive of ... The court shall afford the defendant and his counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it. (emphasis added)

The Court of Appeals notes that these requirements were satisfied. The Court points out that the Petitioner "read" the report on August 19, 1983 with the implication that it satisfies the requirements of the law. Such a restrictive view of the Rule should not

be acceptable to this Court. The Petitioner was brough to Court and taken to a room to read the report alone. Once he had completed his reading, he was brought to Court to face an evidentiary hearing on the allegations contained therein. He was expected to asimilate the lengthy report and make well-reasoned objections without having discussed the report with counsel. We can not believe that this Honorable Court would approve of such a procedure.

It does not appear that the Court of Appeals gave consideration to the fact that the Petitioner was at all times incarcerated and, therefore, unable to visit with counsel regarding the reports. Indeed, at the hearing it was made clear that the Petitioner had not

been allowed to review his presentence report prior to the evidentiary hearing on account of scheduling problems at the confinement facility.

When the Petitioner was able to appear with Florida counsel, the District Court made it patently clear that "... the time necessary for this (sentencing) is about 15 minutes."

We have found no reported decisions within the Second Circuit to indicate the proper procedures to be followed under Rule 32(c)(3). However, other circuits have stated that the Court must explicitly state whether it was relying on the disputed information and failure to comply has always resulted on remand for new sentencing. United States vs. Petitto, 767 F. 2d 607, 609-

610 (9th Cir. 1985); United States v. Stewart, 770 F. 2d 825, 832 (9th Cir. 1935); United States v. Rone, 743 F. 2d 1169 (7th Cir. 1984).

Particularly interesting are the cases of United States v. Velasquez, 748 F. 2d 972 (5th Cir. 1984) and United States vs. Rone, supra, where the Court faced disputed matters which were in the nature of opinions, to wit, whether the defendant was a "notorious alien smuggler" and whether the value or useful amount of marijuana was the total weight of the plant. In both cases remand for new sentencing was directed. In those cases the trial court had not made any "findings" whatsoever and in that regard may be distinguished; however, the Court in Rone, supra.,

made it clear that to make the report available in a nominal sense and deny the defendant "a real opportunity" to see it is to defeat the purposes of the amended rule, at page 1175.

The Court made no finding whatsoever regarding the contention that the Petitioner was a "smuggler". The matter was well presented before the Court but no finding was made. Furthermore, we can not accept the Court's reasoning that possession of loaded guns at home while sleeping establishes that a person is "violent". The hearing was conducted to determine if all circumstances did, in fact, indicate that the Petitioner was "capable of violent conduct". The hearing was not set to determine if the weapons had, in fact,

been seized but to look into the Petitioner's "conduct". (If we follow the Court's analogy, all law enforcement officers are "violent", which we do not believe is true under any circumstances.)

This Honorable Court needs to address this important procedural question not only for the sake of the Petitioner but to guide the trial courts. The presentence report follows a defendant through his institutional confinement and it is very important. We speculate that only a few cases produce extensive evidentiary hearings to determine the accuracy of "characterization" of a Petitioner made in a sentencing report. However, we contend that such characterizations are far more detrimental to a Petitioner than a "factual"

inaccuracy since they imply a pattern of conduct not just isolated instances of misconduct.

III

On August 24, 1983, the Petitioner was sentenced to ten (10) years of confinement on each of three (3) counts of the indictment to run concurrently, in addition to a special parole term of ten (10) years. For his involvement in these same offenses, although he plead guilty to only one count, the codefendant CINELLI was sentenced to four (4) years of confinement, in addition to a special parole term of six (6) years. The "gravity of the offenses" apparently being the same except for the fact that one subjected himself to trial on the

charges while the other entered a guilty plea.

On April 5, 1985, over two years after the commission of the offenses, the Petitioner requested reduction of his sentence and submitted extensive documentation in support of the motion. Statements, affidavits and achievements were presented to the sentencing court; however, the Petitioner's motion was denied "with a brief reference to the gravity of the offenses."

Rule 35, Federal Rules of Criminal Procedure, does not give any specific guidance to the courts with respect to the factors to be considered for reduction of sentence. Impliedly such a decision should not be arbitrary or capricious and based upon the sound

discretion of the court. The Court now had the opportunity to consider the Petitioner's conduct and behavior after two years of institutional confinement but disregarded all that with a brief reference to the gravity of the offenses. Similarly, the Court of Appeals notes that the offenses were "serious". The same offenses for which the codefendant only received a fraction of the Petitioner's sentence.

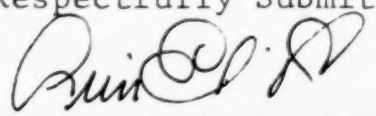
We believe that there were sufficiently meritorious factors presented in the motion to warrant some consideration. To say that the "gravity of the offenses" is sufficient consideration by and of itself is to ignore all legislative attempts at rehabilitation and disregard the sentencing process. This

is more particularly so in a case like this where the court now has two years of the Petitioner's record in custody to consider and better evaluate.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,



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# APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

-against-

GIOVANNI MASI,

Defendant.

----------x

83 CR 00141(S)

Memorandum
of Decision
and Order

September 10, 1985

A P P E A R A N C E S :

HONORABLE RAYMOND J. DEARIE
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Ephraim Savitt, Assistant
U.S. Attorney

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MISHLER, District Judge

Defendant, Giovanni Masi, was convicted after trial before a jury of (1) conspiracy to distribute cocaine in violation of 21 U.S.C. § 846, (2) distribution of cocaine in violation of 21 U.S.C. § 841(a)(1), and (3) possession with intent to distribute in violation of 21 U.S.C. § 841(b)(1)(A). The verdict was returned on July 7, 1983. Defendant moved to set aside the verdict and

for a new trial pursuant to Fed.R.Crim.P. 33 and arrest of judgment pursuant to Fed.R.Crim.P. 34.

The pre-sentence report contained the following:

> . . . He [Masi] is described by government authorities as a major cocaine smuggler and distributor. He is suspected of being a major source of supply for methaqualone in the Florida area. If deemed necessary by the Court the government will produce an individual who can testify to these allegations. (p.4).
>
> . . . [O]n March 24, 1983 Giovanni Masi was arrested on the instant offense in his apartment in Miami, Florida. Found in Masi's bedroom were two loaded nine millimeter operable handguns and one loaded operable .380 caliber firearm. (p.3-4).

On August 19, 1983, the court conducted a "Fatico" hearing. The court found that the challenged statements were supported by the evidence. On August 24, 1983, the court, having denied Masi's motion to set aside the verdict and for a new trial, sentenced him to three (3) concurrent terms of ten (10) years and a special parole term (on Counts Two and Three) of ten (10) years. The judgment of conviction and sentence was affirmed, 742 F.2d 1442 (2d Cir. 1984), cert. denied, ___ U.S. ___ (January 21, 1985).

Masi now moves for (1) a new trial on the ground that the court failed to make findings required under Rule 32(c)(3)(D) on the challenged matters in the pre-sentence report, and (2) a reduction in sentence pursuant to Rule 35 on the grounds that he has been a productive member of society and that his "institutional conduct has been beyond reproach." (Aff. April 5, 1985, p.5-6).

Subsequent to making the original motion, Masi asserted as an additional ground for a new trial "information . . . made known to the undersigned attorney to the effect that the co-defendant, Joseph Cinelli, may now be willing to discuss information in this case with the Defendant's attorney. In particular, reference has been made to a meeting between law enforcement agents (FBI and DEA) with Mr. Cinelli in Elmont, New York to make a case against the defendant. The co-defendant has also disclosed other information indicating that there were other investigative steps, etc. . . ." (Aff. July 2, 1985, p.2).

DISCUSSION

We deny defendant's Rule 35 motion with a brief reference to the gravity of the offenses. We believe

that he is a danger to society and a substantial prison term is appropriate.

We are satisfied that the findings made at the conclusion of the "Fatico" hearing comply with Rule 32(c)(3)(D). United States v. Velasquez, 748 F.2d 972 (5th Cir. 1984) is inapposite. There the "court made no response to Velasquez's objection." Id. at 974. The court in Velasquez remanded the case for resentencing. Here the court conducted an extensive hearing and made findings.

Masi asserts as a ground for a new trial pursuant to Rule 33, that it is "in the interest of justice." The affidavit in support of the motion describes Cinelli's information as constituting "newly discovered evidence." Guiseppe Cinelli pled guilty prior to the commencement of Masi's trial. Cinelli was a member of the conspiracy with which Masi was charged. The moving papers fail to show that (1) Masi attempted to obtain Cinelli's testimony at trial with due diligence; (2) the nature of the testimony; and (3) how it became available after trial.

A motion for a new trial on newly discovered evidence should be granted only where the moving party

shows: (a) that the evidence was discovered since trial; (b) the movant had used due diligence; (c) the evidence would not be merely cumulative or impeacning; (d) that the evidence is material to the issues; and (e) that the evidence would probably produce a different result. United States v. Alessi, 638 F.2d 466, 479 (2d Cir. 1980); United States v. Williams, 613 F.2d 573, 575 (5th Cir. 1980); United States v. Conzemims, 611 F.2d 695, 696 (8th Cir. 1979).

The vague and conclusory statements of Masi's counsel are insufficient. All the motions are denied, and it is

SO ORDERED.

U. S. D. J.

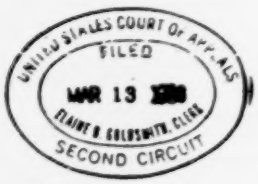
# APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of March , one thousand nine hundred and eighty-six.

PRESENT:

Hon. James L. Oakes,
Hon. Ralph K. Winter,
Hon. George C. Pratt,
Circuit Judges.




United States of America,
Appellee,

v. 85-1387

Giovanni Masi,
Appellant.

O R D E R

Giovanni Masi appeals from the denial of several post-sentence motions by the United States District Court for the Eastern District of New York, Jacob Mishler, Judge. We affirm.

Masi moved for a new trial under Fed. R. Crim. P. 33 on two grounds. The first ground was that a new trial was merited because three DEA reports prepared during the investigation of Masi were not released to him prior to trial despite his general request

for documents. We have examined these three documents and find that they do not warrant a new trial: there is no significant chance that the introduction of this material, which contains nothing inculpatory or valuable for impeachment purposes, at a new trial would lead to a different result. See United States v. Bagley, 105 S. Ct. 3375, 3379-81 (1985); United States v. Alessi, 638 F.2d 466, 479 (2d Cir. 1980). Masi's other ground for his Rule 33 motion -- that codefendant Cinel'i was willing to discuss the case -- is similarly meritless since he offers no evidence that anything Cinelli might say would significantly increase Masi's chance of acquittal.

Masi's contention that Judge Mishler failed to make requisite findings with regard to disputed facts in the presentence report is also meritless. After the Fatico hearing, Judge Mishler resolved major points of contention by holding that Masi "was a major cocaine dealer and dealt in qualudes [sic] ... [and that] he was in business for a long time." Judge Mishler's determination that Masi's ample stock of loaded guns indicated that he was violent is not explicitly stated, but is nonetheless clear. The fact that Judge Mishler made the latter finding before the evidentiary part of the Fatico hearing occurred does not make it invalid. An evidentiary hearing was not required; it was necessary only that the judge fairly consider the claims advanced, as he did. See United States

v. LoRusso, 695 F.2d 45, 51 n.2 (2d Cir. 1982), cert. denied, 460 U.S. 1070 (1983).

The requirements of Rule 32(c)(3)(A) and (D) that the prisoner be allowed to read his presentence report at "a reasonable time before imposing sentence" and that he be given adequate opportunity to comment on the report were also satisfied. Masi read the report on August 19, five days before sentencing. His attorneys had the opportunity to comment on the report both on August 19 and before sentencing on August 24.

Judge Mishler acted well within his discretion in denying Masi's motion to reduce his sentence. The evidence below demonstrated that Masi was a major drug trafficker, and the offenses for which he was convicted are serious.

Affirmed.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

JAMES L. OAKES,

RALPH K. WINTER,

GEORGE C. PRATT, Circuit Judges.

B3

86 - 8

Supreme Court, U.S.
FILED
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# APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

APPENDIX A - MEMORANDUM OF
DECISION AND ORDER, U.S.D.C. .. A1

APPENCIX B - ORDER, U.S. COURT
OF APPEALS, SECOND CIRCUIT .... B1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

-against-

GIOVANNI MASI,

Defendant.

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83 CR 00141 (S)

Memorandum of
Decision and Order

September 10, 1985

A P P E A R A N C E S:

HONORABLE RAYMOND J. DEARIE
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MISHLER, District Judge

Defendant, Giovanni Masi, was

convicted after trial before a jury of (1) conspiracy to distribute cocaine in violation of 21 U.S.C. S 846, (2) distribution of cocaine in violation of 21 U.S.C. S 841 (a)(1), and (3) possession with intent to distribute in violation of 21 U.S.C. S 841 (b)(1)(A). The verdict was returned on July 7, 1983. Defendant moved to set aside the verdict and for a new trial pursuant to Fed. R. Crim. P. 33 and arrest of judgment pursuant to Fed. R. Crim. P. 34.

The pre-sentence report contained the following:

> . . . He (Masi) is described by government authorities as a major cocaine smuggler and distributor. He is suspected of being a major source of supply for methaqualone in the Florida area. If deemed necessary by the Court the government will produce an individual who can testify to these allegations. (p. 4).
>
> . . . (O)n March 24, 1983 Giovanni

> Masi was arrested on the instant offense in his apartment in Miami, Florida. Found in Masi's bedroom were two loaded nine millimeter operable handguns and one loaded operable .380 caliber firearm. (p. 3-4).

On August 19, 1983, the court conducted a "Fatico" hearing. The court found that the challenged statements were supported by the evidence. On August 24, 1983, the court, having denied Masi's motion to set aside the verdict and for a new trial, sentenced him to three (3) concurrent terms of ten (10) years and a special parole term (on Counts Two and Three) of ten (10) years. The judgment of conviction and sentence was affirmed, 742 F. 2d 1442 (2d Cir. 1984), cert. denied, ____ U.S. ____ (January 21, 1985).

Masi now moves for (1) a new trial on the ground that the court failed

to make findings required under Rule 32 (c)(3)(D) on the challenged matters in the pre-sentence report, and (2) a reduction in sentence pursuant to Rule 35 on the grounds that he has been a productive member of society and that his "institutional conduct has been beyond reproach." (Aff. April 5, 1985, p. 5-6).

Subsequent to making the original motion, Masi asserted as an additional ground for a new trial "information . . . made known to the undersigned attorney to the effect that the co-defendant, Joseph Cinelli, may now be willing to discuss information in this case with the Defendant's attorney. In particular, reference has been made to a meeting between law enforcement agents (FBI and DEA) with Mr. Cinelli in Elmont, New York to make a case against the defendant. The co-defendant has

also disclosed other information indicating that there were other investigative steps, etc. . . ." (Aff. July 2, 1985, p. 2).

DISCUSSION

We deny defendant's Rule 35 motion with a brief reference to the gravity of the offenses. We believe that he is a danger to society and a substantial prison term is appropriate.

We are satisfied that the findings made at the conclusion of the "Fatico" hearing comply with Rule 32 (c)(3)(D). United States v. Velasquez, 748 F. 2d 972 (5th Cir. 1984) is inapposite. There the "court made no response to Velasquez's objection." Id. at 974. The court in Velasquez remanded the case for resentencing. Here the court conducted an extensive hearing and made findings.

Masi asserts as a gound for a

new trial pursuant to Rule 33, that it is "in the interest of justice." The affidavit in support of the motion describes Cinelli's information as constituting "newly discovered evidence." Guiseppe Cinelli pled guilty prior to the commencement of Masi's trial. Cinelli was a member of the conspiracy with which Masi was charged. The moving papers fail to show that (1) Masi attempted to obtain Cinelli's testimony at trial with due diligence; (2) the nature of the testimony; and (3) how it became available after trial.

A motion for a new trial on newly discovered evidence should be granted only where the moving party shows: (a) that the evidence was discovered since trial; (b) the movant had used due diligence; (c) the evidence would not be merely cumulative or

impeaching; (d) that the evidence is material to the issues; and (e) that the evidence would probably produce a different result. United States v. Alessi, 638 F. 2d 466, 479 (2d Cir. 1980); United States v. Williams, 613 F. 2d 573, 575 (5th Cir. 1980); United States v. Conzemims, 611 F. 2d 695, 696 (8th Cir. 1979).

The vague and conclusory statements of Masi's counsel are insufficient. All the motions are denied, and it is

SO ORDERED.

U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of March, one thousand nine hundred and eighty-six.

PRESENT:

Hon. James L. Oakes,
Hon. Ralph K. Winter,
Hon. George C. Pratt,
Circuit Judges.

United States of America,
Appellee,

v. 85-1387

Giovanni Masi,
Appellant.

O R D E R

Giovanni Masi appeals from the denial of several post-sentence motions by the United States District Court for the Eastern District of New York, Jacob Mishler, Judge. We affirm.

Masi moved for a new trial under Fed. R. Crim. P. 33 on two grounds. The first ground was that a new trial was merited because three DEA reports prepared during the investigation of Masi were not released to him prior to trial despite his general request for documents. We have examined these three documents and find that they do not warrant a new trial: there is no significant chance that the introduction of this material, which contains nothing inculpatory or valuable for impeachment purposes, at a new trial would lead to a different result. See United States v. Bagley, 105 S. Ct. 3375, 3379-81 (1985); United States v. Alessi, 638 F. 2d 466, 479 (2d Cir. 1980). Masi's other ground for his Rule 33 motion -- that codefen-

dant Cinelli was willing to discuss the case -- is similarly meritless since he offers no evidence that anything Cinelli might say would significantly increase Masi's chance of acquittal.

Masi's contention that Judge Mishler failed to make requisite findings with regard to disputed facts in the presentence report is also meritless. After the Fatico hearing, Judge Mishler resolved major points of contention by holding that Masi "was a major cocaine dealer and dealt in qualudes (sic) ... (and that) he was in business for a long time." Judge Mishler's determination that Masi's ample stock of loaded guns indicated that he was violent is not explicitly stated, but is nonetheless clear. The fact that Judge Mishler made

the latter finding before the evidentiary part of the Fatico hearing occurred does not make it invalid. An evidentiary hearing was not required; it was necessary only that the judge fairly consider the claims advanced, as he did. See United States v. LoRusso, 695 F. 2d 45, 51 n.2 (2d Cir. 1982), cert. denied, 460 U.S. 1070 (1983).

The requirements of Rule 32(c)(3)(A) and (D) that the prisoner be allowed to read his presentence report at "a reasonable time before imposing sentence" and that he be given adequate opportunity to comment on the report were also satisfied. Masi read the report on August 19, five days before sentencing. His attorneys had the opportunity to comment on the report

both on August 19 and before sentencing on August 24.

Judge Mishler acted well within his discretion in denying Masi's motion to reduce his sentence. The evidence below demonstrated that Masi was a major drug trafficker, and the offenses for which he was convicted are serious.

Affirmed.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

JAMES L. OAKES,

RALPH K. WINTER,

GEORGE C. PRATT,
Circuit Judges.

Supreme Court, U.S.
FILED
SEP 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-8

# In the Supreme Court of the United States

OCTOBER TERM, 1986

GIOVANNI MASI, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether petitioner's motion for a new trial alleging newly discovered evidence was properly denied by the district court.

2. Whether the district court made findings of fact as to disputed allegations in the presentence report, as required by Fed. R. Crim. P. 32(c)(3)(D).

3. Whether the district court abused its discretion in denying petitioner's motion for reduction of sentence.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 1 |
| Argument | 5 |
| Conclusion | 7 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *United States v. Masi*, 742 F.2d 1442, cert. denied, 469 U.S. 1188 | 2 |
| *United States* v. *Petitto*, 767 F.2d 607 | 6 |
| *United States* v. *Rone*, 743 F.2d 1169 | 6 |
| *United States* v. *Stewart*, 770 F.2d 825, cert. denied, No. 85-5733 (Jan. 27, 1986) | 6 |
| *United States* v. *Velasquez*, 748 F.2d 972 | 6 |


Statutes and rules:


| | |
|---|---|
| 18 U.S.C. 2 | 1, 2 |
| 21 U.S.C. 841(a) | 2 |
| 21 U.S.C. 841(a)(1) | 1 |
| 21 U.S.C. 846 | 1 |
| Fed. R. Crim. P.: | |
| Rule 32(c)(3)(D) | 2, 3, 5, 6 |
| Rule 35 | 2, 7 |

# In the Supreme Court of the United States

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No. 86-8

GIOVANNI MASI, PETITIONER

*v.*

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B5) is unreported. The opinion of the district court (Pet. App. A1-A7) is also unreported.

### JURISDICTION

The judgment of the court of appeals was entered on March 13, 1986. The petition for a writ of certiorari was filed on May 12, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiring to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. 846; aiding and abetting the distribution of cocaine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2; and aiding and abetting the possession of cocaine with intent to distribute it, also

in violation of 21 U.S.C. 841(a) and 18 U.S.C. 2. Petitioner was sentenced to concurrent ten-year prison terms on all three counts and to additional concurrent ten-year special parole terms on the latter two counts (Pet. App. A3). The court of appeals affirmed, and this Court denied certiorari. 742 F.2d 1442 (2d Cir. 1984) (Table), cert. denied, 469 U.S. 1188 (1985).

Thereafter, petitioner sought a new trial on the ground of newly discovered evidence and on the ground that the district court had failed to make findings of fact regarding challenged portions of the presentence report, as required by Fed. R. Crim. P. 32(c)(3)(D). Petitioner also sought a reduction in his sentence pursuant to Fed. R. Crim. P. 35. The district court denied the motions (Pet. App. A1-A7), and the court of appeals affirmed (Pet. App. B1-B5).

1. Prior to sentencing, petitioner requested a hearing concerning various statements in the presentence report (8/19/83 Tr. 7). Specifically, petitioner challenged the characterization of him in the report as a major cocaine smuggler and dealer, as a methaqualone dealer and distributor in Florida, and as someone who was "capable of violent conduct." The hearing was held on August 19, 1983. Prior to hearing any testimony, the court noted that the seizure of several fully loaded, operable firearms from petitioner's apartment at the time of his arrest (a fact that had been adduced at the pre-trial suppression hearing) was more than sufficient indication that petitioner was "a man of violence" (*id.* at 6-9).

The government then put on testimony from three witnesses: a DEA agent and two of petitioner's former customers, Lucinda Sherman and George Bakke. Sherman testified that on numerous occasions prior to his arrest, petitioner sold her large quantities of methaqualone and cocaine (8/19/83 Tr. 51-52). On one occasion, she also observed petitioner selling cocaine to two uniformed Dade

County police officers inside petitioner's garage (*id.* at 62-63, 69-70). Petitioner told Sherman that he was capable of supplying virtually unlimited quantities of cocaine (*id.* at 62). Sherman also said that petitioner had several firearms and that he had carried one such firearm as a protective measure when he sensed danger from law enforcement officers (*id.* at 57-62). Bakke, the other civilian witness, provided further support for the statements in the presentence report. He testified that he had observed satchels of cocaine that petitioner and one of his associates had transported to the Long Island area. Petitioner had told Bakke that the cocaine was destined for customers in Boston and Philadelphia. In addition, both Sherman and Bakke reported that the cocaine petitioner distributed was in the form of round masses which, they were advised, had been smuggled into the United States by "body-carriers." 8/19/83 Tr. 52-53, 72-79.

On August 24, 1983, prior to sentencing, the district court made findings concerning the disputed statements in the presentence report. The court specifically found that petitioner was a substantial trafficker in cocaine and methaqualone and that he had been in possession of several loaded guns (8/24/83 Tr. 94-100).

2. After his conviction had become final, petitioner filed his motions for a new trial and for reduction of sentence. With regard to the motion challenging the presentence report and the sentencing proceeding, the court observed that it had conducted an extensive hearing concerning the presentence report and had made specific findings in compliance with Rule 32(c)(3)(D) (Pet. App. A5). With regard to petitioner's claim of newly discovered evidence, the court held that petitioner's vague and conclusory allegations were insufficient to show the nature of the evidence and how it became available only after trial (Pet. App. A6-A7). In response to the motion to reduce

sentence, the court found that petitioner's sentence was proper in light of the gravity of the offenses and the fact that petitioner was a danger to society (Pet. App. A5).

The court of appeals affirmed (Pet. App. B1-B5). The court examined the three DEA reports that petitioner claimed had been improperly withheld and found that those reports contained nothing that would lead to a different result at a new trial (Pet. App. B2).[1] In addition, the court found nothing of significance in petitioner's claim that his co-defendant, Giuseppe Cinelli, was now willing to discuss the case. The court pointed out that petitioner had "offer[ed] no evidence that anything Cinelli might say would significantly increase [petitioner's] chance of acquittal" (Pet. App. B3). The court also concluded that, contrary to petitioner's contention, the district court had made the requisite findings about the disputed facts in the presentence report, and that petitioner and his attorney had had an ample opportunity to read and comment on the presentence report prior to sentencing. Pet. App. B3-B4. Finally, the court concluded that the district court acted well within its discretion in denying petitioner's motion to reduce his sentence, since petitioner was a "major drug trafficker" who had been convicted of serious offenses (Pet. App. B5).

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[1] The reports were not part of the record in the district court. On appeal, the government produced the documents at the court's request. Two of the reports were prepared during the course of a DEA investigation into petitioner's methaqualone sales in Florida from late 1981 through September 1982, a period prior to that charged in the indictment. Included in the reports were Lucinda Sherman's statements about her purchase of cocaine and methaqualone from petitioner and her observation of petitioner's sale of cocaine to two Dade County police officers. The third report, dated January 17, 1983, was a personal history of petitioner prepared by one of the Miami DEA agents who arrested petitioner. It contained general biographical data about petitioner that was learned during the course of the investigation.

## ARGUMENT

1. Petitioner's principal contention (Pet. 12-17) is that he was entitled to a new trial based on his post-trial discovery of three DEA reports that the government failed to produce at trial. He claims that those documents were material to his case and that, at a minimum, an evidentiary hearing was necessary to ascertain the impact they would have had at his trial. That claim is patently without merit.

To begin with, as petitioner concedes (Pet. 17), the information contained in the DEA reports related solely to evidence that was adduced at the sentencing hearing. The information was in no way material to the issues at trial. Moreover, after examining the documents, the court of appeals found that they contained nothing exculpatory (Pet. App. B2). Far from being helpful to petitioner, the documents contained incriminating information about petitioner's prior crimes that was consistent with the evidence presented at the sentencing hearing. Since petitioner's new trial motion was totally lacking in merit, there was no reason for the district court to hold an evidentiary hearing on the motion.

2. Petitioner next argues (Pet. 18-25) that the district court failed to make findings of fact concerning disputed portions of the presentence report, as required by Fed. R. Crim. P. 32(c)(3)(D).[2] Once again, even if petitioner's complaint about the sentencing proceeding were well founded, it would not have entitled petitioner to a new trial. In any event, however, petitioner's claim is squarely rebutted by the record.

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[2] Petitioner also maintains (Pet. 19-20) that he was not given an adequate opportunity to study the presentence report. Yet as the court of appeals found (Pet. App. B4), and as petitioner himself concedes (Pet. 19-20), petitioner read the presentence report on August 19, 1983, five days before his sentencing. Moreover, the court of appeals correctly noted (Pet. App. B4-B5) that petitioner's attorneys had an opportunity to read and comment on the report both on August 19,

After the evidentiary hearing on the presentence report, the district court found that the evidence established "that for a period of time [petitioner] has been selling quaaludes and cocaine. He has not been caught before this instance. He was not a law abiding citizen." 8/24/83 Tr. 98; see also 8/19/83 Tr. 84 (court found that statement in presentence report that petitioner was a major cocaine dealer and dealt in quaaludes was "amply supported by the record"). At the outset of the August 19 hearing, the court observed that petitioner had been caught with several loaded pistols when he was arrested and that such circumstances indicated that he was "a man of violence" (8/19/83 Tr. 7). The court later reiterated its conclusion that the evidence showed petitioner's violent nature (see 8/24/83 Tr. 97) (noting that petitioner was "a cocaine dealer who had loaded guns" and was not "just an ordinary individual * * * who [felt] he must protect his business"). Thus, contrary to petitioner's claim, the record shows that the district court made precisely the findings required by Fed. R. Crim. P. 32(c)(3)(D).[3]

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1983, and on August 24, 1983, the date of the sentencing. The case of *United States* v. *Rone*, 743 F.2d 1169 (7th Cir. 1984), relied on by petitioner, is not to the contrary. In *Rone*, the defendant claimed that he had not been given an opportunity to review the presentence report prior to sentencing, and there was nothing in the record to demonstrate otherwise.

[3] Petitioner relies (Pet. 21-22) on four cases in support of his claim that the district court failed to comply with Rule 32(c)(3)(D): *United States* v. *Stewart*, 770 F.2d 825 (9th Cir. 1985), cert. denied, No. 85-5733 (Jan. 27, 1986); *United States* v. *Petitto*, 767 F.2d 607 (9th Cir. 1985); *United States* v. *Velasquez*, 748 F.2d 972 (5th Cir. 1984); and *United States* v. *Rone*, 743 F.2d 1169 (7th Cir. 1984). These cases do not even remotely support his claim. In each of them, the district court had erroneously imposed sentence without making *any* findings of fact as to disputed allegations in the presentence report.

Petitioner's final argument—that the district court abused its discretion in denying his Rule 35 motion for a reduction in sentence--is also without merit. As the court of appeals observed, the "evidence below demonstrated that [petitioner] was a major drug trafficker, and the offenses for which he was convicted [were] serious" (Pet. App. B5). Petitioner's sentence fell well within the statutory limits, and in light of petitioner's background and the nature of his offense, the district court was fully justified in denying the discretionary relief of a reduction in sentence.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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